Supreme Court, U.S.
F I L E D
JAN 29 1997
CLERK

No. 96-1069

In The Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW, Petitioner

vs.

ANESTHESIA PARTNERS, INC.,
ANESTHESIA PARTNERS OF MONTANA, and
SAINT VINCENT HOSPITAL &
HEALTH CENTER, INC., Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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DEVELOPMENTS SINCE FILING OF PETITION

1. *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324 (10th Cir. 1996), dec. November 29, 1996, reveals a conflict between the Tenth and Ninth Circuits regarding a foreclosed competitor's causal anti-trust injury, which is an important federal question.

2. On January 14, 1997, a Montana District Court jury sitting in *Hylton v. Anesthesia Partners, Inc., et al.*, Montana 13th Judicial District Court, Yellowstone County, Cause No. DV 93-815, returned a $753,600.00 verdict, before trebling, against two of these Respondents, and in favor of an excluded anesthesiologist situated identically to Healow, after finding under Montana law an unreasonable restraint of competition, an unlawful tying arrangement, an illegal monopoly, and a breach by Saint Vincent of the Medical Staff Bylaws.

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Brown v. Presbyterian Health Care Services,
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ARGUMENT

I. *Brown* and Causal Anti-Trust Injury.

Dr. Brown was a physician who suffered revocation of her privileges to practice obstetrics at her local hospital. She brought anti-trust claims against the hospital, its administrator, and a competitor obstetrician. Dr. Brown recovered an anti-trust judgment, affirmed on appeal, against the hospital administrator and the obstetrician. The Tenth Circuit discussed Dr. Brown's claims of anti-trust injury as follows, 101 F.3d at 1335:

> A private plaintiff seeking to invoke the antitrust laws must show the defendants caused her alleged injury. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1459 (11th Cir. 1991) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986)). The key question in determining the defendants' ability to 'cause a restraint [of trade] to be imposed' is whether the defendants had control over the decision making process, or the ability to coerce or unduly influence the decision. * * * Where a reasonable jury could conclude from the evidence that the defendants controlled, coerced, or unduly influenced the decision that resulted in a restraint of trade, a genuine issue of material fact exists on the issue of causation.

Clearly, the Tenth Circuit has held that a competitor who suffers damage resulting from an unlawful restraint of trade suffers anti-trust injury. The Ninth Circuit held

otherwise in this case. The Court should grant certiorari in order to resolve this conflict between the Circuits.

II. The *Hylton* State Law Verdict.

Healow's colleague, Dr. Robert Hylton, also was locked out of his practice at St.V's on September 1, 1992, for the same reasons that Healow was excluded from his practice. Dr. Hylton (wisely as it turned out) alleged only State law claims in the suit he filed against the Respondents here. On January 13, 1997, Dr. Hylton obtained a verdict on liability issues establishing that St.V's breached its Medical Staff Bylaws, and that St.V's and Anesthesia Partners of Montana unreasonably restrained competition, implemented an unlawful tying arrangement, and created an illegal monopoly for general and obstetrical anesthesia services. On January 14, Dr. Hylton obtained a damages verdict in the amount of $753,600.00, which when trebled would be $2,260,800.00. (*See*, Appendix pp. SA-1–6.) St.V's and APM have since paid Dr. Hylton $2 Million to settle his case against them.

The *Hylton* case establishes that the Federal courts have grossly erred in their interpretations of Montana law. Healow was no less entitled than Dr. Hylton to have a jury consider his state anti-trust and contract claims. Only this Court can now undo the unjust result.

A. *Hylton's* State Law Implications.

1. Montana Anti-Trust Law. Hylton's State law anti-trust theories were identical to Healow's. The State District Court denied a defense summary judgment

motion which was identical to the motion granted and affirmed in this case. (*See*, Appendix pp. SA-7–19.) Regarding anti-trust injury, the District Court stated:

> Hylton responds that significant case authority from the Ninth Circuit supports his claim. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988). Hylton notes a nurse in Oltz and a doctor in Jefferson Parish Hospital v. Hyde, 466 U.S. 2, (1984), were found to have standing for anti-trust claims.
>
> * * *
>
> ... In analyzing the next issue injury, the Court is guided by the analysis in Oltz, supra, and Jefferson Parish, supra. Both cases found injury to competition could exist, not only with regard to consumers of medical services, but also with regard to providers of anesthesiological service. See Jefferson Parish, 466 U.S. at 7, and Oltz, 861 F.2d at 1447. Jefferson Parish, also identified the injury as impacting providers because the hospital was precluded from offering staff privileges to anyone but the exclusive group of anesthesiologists. 466 U.S. at 7. Sufficient factual issues have been raised by the affidavits of Hylton to allow a trial in which the jury can evaluate competitive harm to providers in the Billings market. See, Oltz, at 1447, 1448.
>
> * * *
>
> Further, significant authority exists in the Ninth Circuit which has not been limited or reversed that has applied the Rule of Reason to

an exclusive contract between the hospital and anesthesiologists. Oltz, supra. This analysis is also consistent with the stated overall goal of broad interpretation of the Montana Act, § 30-14-201, MCA.

(*See*, Appendix, pp. SA-15–18.)

Healow raised the same factual issues which Dr. Hylton raised. Healow was entitled to a trial on his state theories, just as Dr. Hylton was. This Court should undo the egregious result fashioned below which deprived Healow of his trial.

2. Breach of Contract. The District Court and the Circuit Court both rejected Healow's contract claims by determining that a "general policy" exception to the Medical Staff Bylaws was applicable–despite Healow's extensive arguments to both courts that the term "general policy" was ambiguous, and therefore a genuine issue of material fact for resolution by a jury.

The Montana District Court in *Hylton* recognized the ambiguity of "general policy", holding:

> Fact issues on the breach of this contract exist to defeat summary judgment. Remedies for breach of contract are provided for by Montana statute, §27-1-107, MCA, and 27-1-311, MCA. If the jury finds a breach of contract it will determine damages. Further, the jury will construe and resolve ambiguities in the By-Laws. In this instance, several of the By-Laws were not implemented by St. Vincent based upon a general policy exclusion. General

> policy is undefined by the By-Laws and is, therefore, ambiguous. The jury will determine the parties' intent. Klawitter v. Detman, 268 Mont. 275, 886 P.2d 416 (1994). Defendants' motion for summary judgment on breach of contract is, therefore, DENIED.

(*See*, Appendix, pp. SA-12–13.)

The Montana District Court specifically instructed the jury regarding the crux of the contract dispute and the alleged applicability of the general policy exception (*See,* Instruction 5-2, Appendix pp. pp. SA-20); and also gave the jury the usual instructions setting forth the rules of construction for resolving ambiguities in contracts. The jury found a breach of contract–thereby rejecting the proposition that the Hospital's actions were "general policy". The *Hylton* jury thus exposed the glaring error which the Circuit Court and District Court made in this case by ruling as a matter of law that the Hospital's actions were general policy and that a jury could not reasonably find otherwise. A jury did reasonably find otherwise, just as a jury might have in this case if the lower courts had followed the mandate of the standard of review for summary judgments.

B. *Hylton* and Federal Anti-Trust Theories.

The Montana District Court Judge analyzed Hylton's entire anti-trust case in light of federal interpretations of federal anti-trust laws, at the conclusion of which he denied *in toto* these Respondents' summary judgment motion, allowing Dr. Hylton's entire anti-trust case to proceed to trial. (He later denied their motions for

directed verdict.) The Montana District Court's "Opinion and Order on Summary Judgment" in *Hylton* is more thorough and far-better reasoned than either the Ninth Circuit opinion or the underlying District Court decision in this case. The *Hylton* jury's findings that there existed an unreasonable restraint of trade, an unlawful tying arrangement, and an unlawful monopoly all were rendered pursuant to jury instructions based upon federal interpretations of the Sherman Act. (*See*, Appendix, pp. SA-20–25.) The jury verdict on the State law anti-trust issues therefor is tantamount to a verdict on federal law anti-trust issues. Also significant with respect to the tying theory is that the State Judge found ample evidence that St.V's held a financial interest in the tied product, anesthesia services. That determination, coupled with the jury's finding that an unlawful tying arrangement exists, belie the federal courts' holdings that, as a matter of law, these respondents did not tie anesthesia services to operating and delivery suites.

Where a jury has concluded that these Respondents committed unlawful restraint of trade on three separate theories, the Ninth Circuit and the District Court quite clearly have violated the standard of review for summary judgments prohibiting judgment as a matter of law where a jury reasonably could determine that the party resisting summary judgment should prevail. Certainly, viewing the facts in a light most favorable to Healow, a jury in the Federal District Court in this case could, upon considering the identical evidence presented to the jury in the *Hylton* case, return a plaintiff's verdict, just as the jury actually did in *Hylton*.

C. *Hylton* and Policy Considerations.

The *Hylton* defendants satisfied Dr. Hylton's demands before judgment was filed – so collateral estoppel is not applicable. However, this Court has recognized in its collateral estoppel decisions the sound policy considerations of fostering reliance on adjudication and promoting comity between State and Federal courts, which this Court has characterized as "a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

Healow recognizes those policy considerations, as has the Montana Supreme Court, which by rule may review issues certified to it by the United States Courts. Healow filed a motion before the Ninth Circuit requesting that the Circuit Court either certify certain Montana law issues to the Montana Supreme Court or defer consideration of the *Healow* appeal until after final resolution of the *Hylton* case. (*See*, Appendix pp. SA-26–29.) Healow suggested to the Ninth Circuit, to no avail, that fundamental notions of justice and fair play demand that Montana state law be applied uniformly in the two cases. The Ninth Circuit rejected Healow's alternative motions without comment. (*See*, Appendix, pp. SA-30.) If this was not an abuse of discretion it certainly was an abuse of common sense.

The disparity in results between the *Healow* and *Hylton* cases hardly serves to foster reliance on adjudication or to promote comity between the State and Federal courts. Instead, the Federal courts have created a travesty, which can lead only to greater cynicism regarding the availability of justice in the Federal

judicial system. It is nothing short of unconscionable that Dr. Hylton's state law claims can result in a $2.26M trebled jury verdict, while Dr. Healow's identical state law claims never even get to a jury for no reason except that Dr.Healow had the misfortune of litigating his case in the inhospitable arena of the United States courts. This Court should grant certiorari in order to eliminate the perversion of Montana state law fashioned by the lower courts; and to assure that the concept of "equal justice for all" merits something more than lip service.

CONCLUSION

This case involves several conflicts among the Circuits regarding important federal questions. It also involves a conflict between the Federal courts and Montana courts regarding important questions of State law, which the Federal courts have completely bungled to date. The result in *Hylton* illuminates just how badly the standard of review for summary judgments was abused by the District Court, and how equally badly that abuse was compounded by the Ninth Circuit Court of Appeals. This Court should grant certiorari in order to address the injustice which has resulted.

Respectfully submitted.

JAMES P. HEALOW
Attorney for Petitioner

January 28, 1997.

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Clerk of the District Court
JEAN A. THOMPSON
97 Jan 15 AM 8:22
Filed

By: _____
Deputy

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON and ROBERT R. HYLTON, M.D., P.C., Plaintiffs, vs. ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC., Defendants.	Cause No. DV-93-815 Judge John W. Larson **SPECIAL VERDICT (LIABILITY)**

We, the jury, in the above-entitled matter, at least eight (8) of our number, find as follows with regard to the Special Verdict:

PART I: BREACH OF CONTRACT

Question No. 1: Did St. Vincent Hospital breach the Medical Staff Bylaws?

Answer: 10 Yes 2 No

PART II: RESTRAINT OF TRADE

Question No. 2: Under the instructions given to you:

a. Did the granting of the exclusive contract have the effect of unreasonably restraining competition among providers of general and obstetrical anesthesia services in the Billings area?

__12__ Yes __0__ No

Instruction: If the Answer to 2a is "no", please proceed to 2b. If the Answer to 2a is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act/

i. St. Vincent Hospital

Answer: __12__ Yes __0__ No

ii. Anesthesia Partners of Montana, P.C.

Answer: __12__ Yes __0__ No

iii. Anesthesia Partners, Inc.

Answer: __0__ Yes __12__ No

b. Did the granting of the exclusive contract have the effect of implementing an unlawful tying arrangement between the St. Vincent Hospital operating and maternity delivery suites and the delivery of general and obstetrical anesthesia services in the Billings area?

__10__ Yes __2__ No

Instruction: If the Answer to 2b is "no", please proceed to 2c. If the Answer to 2b is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act.

i. St. Vincent Hospital

Answer: 10 Yes 2 No

ii. Anesthesia Partners of Montana, P.C.

Answer: 0 Yes 12 No

iii. Anesthesia Partners, Inc.

Answer: 0 Yes 12 No

c. Did the granting of the exclusive contract result in the illegal fixing of prices for general and obstetrical anesthesia services at St. Vincent's Hospital?

0 Yes 12 No

Instruction: If the Answer to 2c is "no", please proceed to 2d. If the Answer to 2c is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act?

i. St. Vincent Hospital

Answer: _____ Yes _____ No

ii. Anesthesia Partners of Montana, P.C.

Answer: _____ Yes _____ No

iii. Anesthesia Partners, Inc.

Answer: _____ Yes _____ No

d. Did the granting of the exclusive contract create an illegal monopoly for general and obstetrical anesthesia services in the Billings area?

9 Yes 3 No

Instruction: If the Answer to 2d is "no", please date and sign the verdict. If the Answer to 2d is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act?

i. St. Vincent Hospital
Answer: 9 Yes 3 No

ii. Anesthesia Partners of Montana, P.C.
Answer: 9 Yes 3 No

iii. Anesthesia Partners, Inc.
Answer: 0 Yes 12 No

DATED this 13th day of January, 1997.

By: /s/
Jury Foreman

Clerk of the District Court
JEAN A. THOMPSON
97 Jan 14 AM 5:18
Filed

By: _____
Deputy

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON and ROBERT R. HYLTON, M.D., P.C.,	)	Cause No. DV-93-815
Plaintiffs,	)	Judge John W. Larson
vs.	)	**SPECIAL VERDICT (DAMAGES)**
ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,	)	
Defendants.	)	

We, the jury, in the above-entitled matter, at least eight (8) of our number, find as follows with regard to the Special Verdict:

PART I: BREACH OF CONTRACT

Question No. 1: Did St. Vincent Hospital's conduct - breach of contract - as found by you herein cause injury to Plaintiff?

Answer: 10 Yes 2 No

PART II: MONTANA UNFAIR TRADE PRACTICE AND CONSUMER PROTECTION ACT

Question No. 2: Did Defendant St. Vincent Hospital's conduct - violation of Montana's Unfair Trade Practice and Consumer Protection Act - as found by you herein cause injury to Plaintiff in his business or property?

Answer: 10 Yes 2 No

Question No. 3: Did Defendant Anesthesia Partners of Montana's conduct - violation of Montana's Unfair Trade Practice and Consumer Protection Act - as found by you herein cause injury to Plaintiff in his business or property?

Answer: 10 Yes 2 No

Question No. 4: What do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of Defendant('s') conduct?

Answer: $ 753,600.00

DATED this 14th day of January, 1997.

By: /s/
Jury Foreman

John W. Larson, District Judge
Fourth Judicial District Dept. 3
Missoula County Courthouse
200 West Broadway
Missoula, MT 59802
(406) 523-4773

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON, Plaintiff, vs. ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC., Defendants.	Cause No. DV-93-815 **OPINION AND ORDER ON SUMMARY JUDGMENT**

Pending before the Court are motions for summary judgment filed by Defendants Anesthesia Partners, Inc. and Anesthesia Partners of Montana (hereinafter AP Inc. and AP Montana) and Saint Vincent Hospital & Health Center, Inc. (hereinafter St. Vincent). Arguments were heard in Columbus, Montana, on September 6, 1996, with the Plaintiff represented by Rockwood Brown,

Esq., of Billings, Montana, the Defendant St. Vincent represented by Greg Murphy, Esq., of Billings, Montana, and the Defendants AP Inc. and AP Montana represented by John Crist, Esq., of Billings, Montana, and James Snead, Esq. of Washington, D.C. Supplemental submissions were permitted until November 6, 1996, by Plaintiff, Billings anesthesiologist Robert R. Hylton (hereinafter Hylton), and until November 11, 1996, for AP Inc., AP Montana, and St. Vincent. The motions for summary judgment on contract and anti-trust claims are denied. The Defendants are granted summary judgment on the claims for tortious interference with business relationships and expectancy.

This is an action filed by Hylton for contract, tort and unfair trade practices, §30-14-201, et seq. MCA, claims. The controversy here grows out of a decision by St. Vincent's Board of Directors, on January 16, 1992, to partially close the hospital's Anesthesia Department pursuant to a recommendation of an Ad Hoc Committee. A more formal recommendation setting out the reasons of the Board was adopted in April 1992. The new framework envisioned an exclusive contract with an anesthesia provider who would in turn contract with other anesthesiologists for the performance of some of the services (general and obstetrical anesthesia) in St. Vincent's Anesthesia Department. Specifically exempted from the closure of the Department were the cardiovascular anesthesia providers. Prior to the 1992 changes, the St. Vincent Anesthesia Department was open and operated with a combination of supervised nurse anesthesiologists (CRNA's) as well as medical doctors (MD's). Further, some of the MD's, such as

Hylton, were individual practioners and others were members of professional partnerships, with some supervising CRNA's and others not. It is important to note that there was not an exclusive provider to the St. Vincent Anesthesia Department prior to the 1992 decisions of St. Vincent.

On June 30, 1992, St. Vincent and AP Montana entered into the contract for the non-cardiovascular anesthesia services. Actual operations under the contract began September 1, 1992. Hylton, who had had an anesthesia practice at St. Vincent since 1970, did not enter into a contract with AP Montana because of his objection to terms concerning termination, medical staff privileges, power of attorney and assignment of billing authority. After September 8, 1992, Hylton was precluded from providing any anesthesia services at St. Vincent. Hylton still retains his staff privileges at St. Vincent. On September 18, 1992, Hylton requested a hearing under the St. Vincent Medical Staff By-Laws, Article 15; St. Vincent denied the request.[1] No Executive Committee action was ever taken on the issue of studying or closing the Anesthesia Department.

[1] By-Law Section 15.1-2(b) provides that actions limiting a physician's ability to exercise his privileges, "if in response to a general policy of the hospital, shall not entitle the affected practitioner to the procedural rights provided under [the] fair hearing plan unless the practitioner produces evidence to the satisfaction of the President of the hospital that raises a reasonable question as to whether the agency's order or hospital's policy was properly implemented."

There is no dispute that the process implemented by St. Vincent bypassed several of the hospital's By-Laws, including Section 11.5-2J requiring its executive committee to evaluate the proposal for closed obstetrical and general anesthesia or Sections 15.1-1(a)(v)(ii), 15.1-3 which require a hearing prior to revoking or limiting a doctor's hospital privileges and Section 8.2-2 which lists the criteria for staff privileges at St. Vincent.

St. Vincent, AP Inc. and AP Montana seek summary judgment on all of Hylton's claims.

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. "Material issues of fact are identified by looking to the substantive law governing the proceeding." Matter of Estate of Lien, 270 Mont. 295, 299, 892 P.2d 530, 532 (1995) (citation omitted). All reasonable inferences that might be drawn from offered evidence should be drawn in favor of the party opposing the motion. Kaseta v. Northwestern Agency of Great Falls, 252 Mont. 135, 827 P.2d 804 (1992). Finally, any doubt regarding the propriety of summary judgment should result in denial of the motion. Whitehawk v. Clark, 238 Mont. 14, 18, 776 P.2d 484, 486-87 (1989). This threshold for denial of summary judgment is low, yet the party opposing summary judgment must come forward with substantial evidence and cannot rest on the allegations of his complaint in order to defeat a summary judgment motion when the movant has overcome the initial burden of establishing an absence of genuine issues of material fact. Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987).

I. Breach of Contract

It is essential to the resolution of this issue that the Court first resolve whether or not a hospital's by-laws are a contract with its medical staff. No case squarely on point from Montana state courts has been cited by the parties. To be sure Montana courts have held hospital by-laws enforceable, Saint Valley Hospital, Inc. v. Kauffman, 169 Mont. 70, 544 P.2d 1219 (1976), and subject to review, Hulit v. St. Vincent Hospital, 164 Mont. 168, 520 P.2d 99 (1974). Further, Montana federal courts have held by-laws to be enforceable through injunctive relief or through money damages if the breach was not in good faith (unreasonable, arbitrary and capricious). Maxwell v. Sisters of Charity of Providence of Montana, 17 Mont.Fed.Rep. 94 (1994).

The majority rule among the states is that hospital by-laws are indeed a contract with the staff. Lewisburg Community Hospital v. Alfredson, 805 S.W.2nd 756 (Tenn. 1991); Pariser v. Christian Health Care Sys., 816 F.2d 1248 (8th Cir. 1987) Ill. Law; Terre Haute Regional Hosp. v. Ellssa, 470 N.E.2nd 1371 (Ind.App. 1984); Lawler v. Eugene Wuestoff Mem. Hosp. Ass'n, 497 So.2nd 1261 (Fla.Dist.Ct.App. 1986); Islami v. Covenant Medical Center, Inc., 822 F.Supp. 1361 (N.D.Iowa 1992); Anne Arundel General Hosp. v. O'Brien, 432 A.2nd 483 (Md. 1981); Joseph v. Passaic Hosp. Assn, 141 A.2d 18 (1958); St. John's Hosp. Med. Staff v. St. John's Regional Med. Center, 245 N.W.2nd 472 (S.D. 1976).

Montana has recognized that by-laws of non-profit corporations are contracts. In Appeal of Two Crow

Ranch, Inc., 159 Mont. 17, 494 P.2d 915 (1972), the Montana Supreme Court held:

> It is a well established precedent that the by-laws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the member's application, constitute a contract between the member and the corporation.

Id., at 23, 494 P.2d at 919.

In order for a contract to arise out of Montana law, four elements must be present: (1) persons capable of contracting, (2) consent of those persons; (3) a lawful object; and (4) consideration. Here, the adoption of the By-Laws by the medical staff and the Board of Directors in the spring and summer of 1990 meet the first three criteria. The remaining criteria, consideration, is met under Montana law because consideration is "sufficient when a party forgoes some advantage or benefit." Ragland v. Sheehan, 256 Mont. 322, 846 P.2d 1000 (1992). Throughout the 86 pages of limitations, the medical staff and the hospital established a process to maintain quality care and accountability to one another. Each has accepted significant limits and bargained away flexibility which this Court construes to be sufficient consideration to establish a contract between the medical staff and the Board.

Fact issues on the breach of this contract exist to defeat summary judgment. Remedies for breach of contract are provided for by Montana statute, §27-1-107, MCA, and 27-1-311, MCA. If the jury finds a breach of contract it will determine damages. Further, the jury will construe and resolve ambiguities in the By-Laws. In this instance, several of the By-Laws were not

implemented by St. Vincent based upon a general policy exclusion. General policy is undefined by the By-Laws and is, therefore, ambiguous. The jury will determine the parties' intent. Klawitter v. Detman, 268 Mont. 275, 886 P.2d 416 (1994). Defendants' motion for summary judgment on breach of contract is, therefore, DENIED.

II. Tortious Interference With Business Relationships and Expectancy

These claims are based upon Hylton's 22 years of anesthesiology practice in Billings and at St. Vincent. He contends the exclusive contract with AP Inc. and AP Montana interfered with contractual relationships between Hylton and unidentified doctors and patients and tortiously interfered with his expectancy of future relationships with unidentified doctors and patients.

The parties agree that the elements of tortious interference with business relationships are stated in Richland Nat'l Bank and Trust v. Swenson, 249 Mont. 410, 816 P.2d 1045 (1991). AP Inc. and AP Montana state there must be some evidence that St. Vincent's actions were: (1) intentional and willful; (2) calculated to cause damage to Hylton in his business; (3) done with the unlawful purpose of causing damage, without right or justifiable cause; and (4) acts which actually cause damage. As to this claim Defendants have met their burden of showing an absence of genuine issues of material fact, particularly as to elements one and two above. In an effort to overcome that, Hylton points to conversations referenced in the Jurist (Hylton's account manager) deposition indicating the hospital

administrator's view that Hylton would not sign the exclusive contract. In this Court's view, a simple prediction by the hospital administrator is insufficient to amount to intentional and willful acts calculated to cause damage to Hylton. The Comments to Restatement of Torts §766, Intentional Interference with Performance of Contract by Third Person, describes intent and purpose in this context as follows:

> If the actor is not acting criminally, nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.

Restatement (Second) of Torts, §766, Comment j.

In Bolz v. Meyers, 200 Mont. 286, 651 P.2d 606 (1982), the Court relied on the factors set forth in Restatement of Torts §767, Factors in Determining Whether Interferance is Improper, which are also useful here. These include (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interest sought to be advanced by the actor; (e) the social interest in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

The actions complained of by Hylton against St. Vincent are minimal when compared to those in Bolz,

to intentionally or wilfully cause damage to Hylton or his business, and, therefore, GRANTS summary judgment to St. Vincents and AP Inc. and AP Montana with regard to Hylton's claims of tortious interference with business relationship and expectancy.

III. Unfair Trade Practices (Antitrust Claims)

Hylton asserts antitrust claims under §30-14-205, MCA, of the Montana Unfair Trade Practices Act prohibiting monopolies, §30-14-205(2)(g); tying arrangements, §30-14-205(1),(2)(d)(g) and (h) and price fixing, §30-14-205(1),(2)(a) and (d). In response to these claims, St. Vincent argues that Hylton has not suffered an anti-trust injury and that if he has it has been at his own hand. St. Vincent also argues the lack of antitrust conspiracy as well as the failure to establish a tying claim. Finally, St. Vincent, AP Inc. and AP Montana argue that agreements of the type at issue here have been generally approved when challenged on federal antitrust grounds. Therefore, since §30-14-104, MCA, directs interpretation of Montana anti-trust provisions in accordance with federal law, this Court should follow the federal trend of approving these arrangements including Konik v. Champlain Valley Physicians Hospital Medical Center, 733 F.2nd 1007 (2d Cir. 1984); BCB Anesthesia Care v. Passabant Memorial Area Hospital Ass'n, 36 F.3rd 664 (7th Cir. 1994).

Hylton responds that significant case authority from the Ninth Circuit supports his claim. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988). Hylton notes a nurse in Oltz and a doctor in Jefferson

Hylton notes a nurse in Oltz and a doctor in Jefferson Parish Hospital v. Hyde, 466 U.S. 2, (1984), were found to have standing for anti-trust claims.

A. Conspiracy: Few Montana cases have been decided under §30-14-205, MCA. Although federal authority is often a guide for the interpretation of the Montana Act, violation of the Montana Act does not require a conspiracy. Thus, the Montana Supreme Court has held that §30-14-104, MCA, does not provide that Montana courts must follow federal interpretations of the Federal Trade Commission Act when interpreting the state act, but rather that the state courts must give "due consideration and weight" to federal interpretations of the federal act. Smith v. Video Lottery Consultants, 260 Mont. 50, 858 P.2d 11 (1993). However, even if a conspiracy were required under Montana law for purposes of this motion, factual issues concerning conspiracy between AP Montana and St. Vincent's exist to preclude summary judgment.

B. Antitrust Injury: In analyzing the next issue injury, the Court is guided by the analysis in Oltz, supra, and Jefferson Parish, supra. Both cases found injury to competition could exist, not only with regard to consumers of medical services, but also with regard to providers of anesthesiological service. See Jefferson Parish, 466 U.S. at 7, and Oltz, 861 F.2d at 1447. Jefferson Parish, also identified the injury as impacting providers because the hospital was precluded from offering staff privileges to anyone but the exclusive group of anesthesiologists. 466 U.S. at 7. Sufficient factual issues have been raised by the affidavits of Hylton to allow a trial in which the jury can evaluate

competitive harm to providers in the Billings market. See, Oltz, at 1447, 1448.

C. Relevant Market: With regard to the relevant market affected, the Court again follows Oltz, supra, which has not been overruled or limited by the Ninth Circuit and finds it to be persuasive and controlling in this area. The relevant market will be Billings.

D. Tying/Rule of Reason: The Court again adopts the framework from Jefferson Parish, supra, and Oltz, supra, to allow the claims of Hylton to proceed.

For the purpose of the pending motions, no dispute exists that with regard to the Billings area, St. Vincent's has a 100% monopoly on obstetrical anesthesiology. Hylton's expert concludes that St. Vincent's has a 53% market share of the non-obstetrical, non-cardiovascular anesthesia. This initial inquiry concerning competition is essential to an analysis of either a tying arrangement or analysis under the rule of reason. The concept of tying is discussed extensively in Jefferson Parish Hospital District No. 2 v. Hyde, supra. Justice O'Connor's concurring opinion in Jefferson Parish describes tying in the following manner:

> Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as a tying product, sugar as the tied product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of General Hospital services and operating room facilities

(the tying service) to the sale of anesthesiology services (the tied services).

466 U.S. at 33.

Justice O'Connor is critical of the intricate analysis involved in tying cases because the analysis diverts attention from the impacts of the arrangement on competition and instead scrutinizes the products involved in tying. As Justice O'Connor noted in her concurring opinion in Jefferson Parish, supra, the inquiry is more properly on the structure of the market and the impact of the arrangement between the hospital and anesthesiologists on the products or services, i.e. the Rule of Reason.

The Rule of Reason predates modern anti-trust legislation but has been consistently upheld and applied in this context. See, e.g., United States v. Addyston Pipe & Steel Co., 85 F.2d 271, (6th Cir.) aff'd 175 U.S. 211 (1898).

Further, significant authority exists in the Ninth Circuit which has not been limited or reversed that has applied the Rule of Reason to an exclusive contract between the hospital and anesthesiologists. Oltz, supra. This analysis is also consistent with the stated overall goal of broad interpretation of the Montana Act, §30-14-201, MCA

Defendants' motion for summary judgment on the state anti-trust claims are DENIED. Jury instructions in this area will be prepared and submitted by the parties at the time of the pre-trial conference set for December 18, 1996, at 9:30 a.m. in Missoula County, applying the rule of reason analysis to the state anti-trust claims. The Court deems the relevant market to be the Billings area.

In summary, summary judgment is GRANTED to Defendants on Plaintiff's tort claim of intentional interference with business relationships and expectancy. Summary judgment is DENIED with respect to Plaintiff's contract and anti-trust claims.

Further, given the school vacation schedule and its impact on potential jurors, trial in this matter is rescheduled from Friday, January 3, 1997, to **JANUARY 6, 1997, AT 9:00 A.M.** in the courtroom of the Honorable Diane G. Barz.

The Court set a pre-trial conference set for Wednesday, December 18, 1996, at 9:30 a.m. Plaintiff's counsel shall arrange a telephone conference call between all attorneys and the Court at that time.

DATED this 11th day of December, 1996.

/S/
JOHN W. LARSON, District Judge

INSTRUCTION NO. 5-2

In this case, Plaintiff claims that under the Hospital's contractual obligations set forth in the Medical Staff Bylaws, the Hospital could not terminate or restrict Plaintiff's medical staff privileges except for cause and then only in accordance with the procedural rights set forth in those Bylaws. Plaintiff contends that the Hospital violated the Bylaws by refusing to allow him to exercise his privileges without cause and without a hearing.

On the other hand, the Hospital contends that actions limiting a physician's ability to exercise his privileges without affording such procedural rights is not a violation of the Bylaws if such action was taken in response to a general policy of the Hospital.

INSTRUCTION NO. 5-13

Unfair Trade Practices Act

In order to show that the restraint was unreasonable, Plaintiff must prove that Defendants' activities substantially harmed competition in a relevant market. To show this, Plaintiff must prove by a preponderance of the evidence:

1. What the relevant market is;

2. That Defendants' restraint or practice had a substantially harmful effect on competition in that relevant market; and

3. That the harmful effect on competition outweighs any beneficial effect on competition.

As to the "relevant market", in this case, I instruct you that the "relevant market" is the market for general and obstetrical anesthesia services in the Billings area.

INSTRUCTION NO. 5-14
(Rule of Reason)

Saint Vincent Hospital had a right to grant an exclusive contract to those providing anesthesia services in the hospital, but it could not do that for the purpose of restraining competition.

Here, the question is not whether Dr. Hylton lost his job as a result of what was done, but whether what was done had the effect of lessening competition. The purpose of the Unfair Trade Practices Act is not to protect competitors but to protect competition. The relevant product is anesthesia services, and the relevant geographic market is the Billings area.

In determining whether the granting of the exclusive contract had the effect of unreasonably restraining competition among providers of anesthesia services in the Billings area, you must balance all of the factors that tend to promote competition against all the factors which tend to restrain it and to decide whether what was done was anti-competitive.

The Hospital was faced with the problem of providing general and obstetrical anesthesia services for the doctors who practiced in the Hospital, and resolve conflict among the general and obstetrical anesthesiologists.

I am now going to discuss the factors to be considered in the balancing process I have mentioned. I think that whether the effect of what was done was pro or anti-competitive is a question of fact for you to decide. I suggest, and this is only a suggestion which you are not bound to follow, that in this balancing you may:

Look at the status of the parties before and after the change in organization. Compare the number of persons likely to be employed before and after. Compare the skill and training of those employed before and after. Compare the costs of service before and after. Compare the right of physicians and patients to choose anesthetists before and after. How did what was done affect the ability of the people involved to compete, considering their education, training and experience? If what was done affected competition for jobs, what was the effect of that competition on the quality of the anesthesia service to be received by the patient? Would it tend to improve or reduce the quality of that service? Balance these and any other factors you deem to be material and then decide whether what was done was anti-competitive.

INSTRUCTION NO. 5-23

Tying

These are the four essential elements Plaintiff must provide to establish an unlawful tying arrangement:

Fist (sic), that St. Vincent Hospital offered its operating rooms and maternity suites on the condition that the patient obtain his or her anesthesia services from

anesthesiologists supplied by Anesthesia Partners of Montana.

Second, that the Hospital has sufficient market power with respect to the market for operating rooms and maternity delivery suites to restrain competition appreciably in the market for anesthesia services, and

Third, that the Hospital had an effect upon a substantial amount of commerce in the market for anesthesia services.

Fourth, that the Plaintiff was injured in his business or property because of the tying arrangement.

If Plaintiff fails to provide any one of these elements, then you must find against Plaintiff on his tying claim.

INSTRUCTION NO. 5-25

Monopoly Power

Monopoly power is the power to dominate or control a market. This means the power to control prices or to exclude competition in the market for general and obstetrical anesthesia services in the Billings area.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating

existing competition from that market or by preventing new competition from entering that market.

To establish the possession of monopoly power, plaintiff need not prove that prices were raised or that competition actually was excluded, but only that Defendants had the power to raise prices or exclude competition.

Further, to conclude that Defendants had monopoly power, you need not find that Defendants could sell at any price they desired or that they had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that Defendants did not have the power to control prices or to exclude competition, then you must conclude that they did not have monopoly power.

INSTRUCTION NO. 5-26

Monopolizing

Plaintiff alleges that he was injured by Defendants' unlawful monopolization of anesthesia services in the Billings area. In order to win on its claim of monopolization, Plaintiff must have proved each of the following elements by a preponderance of the evidence:

First, that Defendants had monopoly power in the general and obstetrical anesthesia market.

Second, that Defendants willfully acquired or maintained that power through restrictive or exclusionary conduct;

Third, that Plaintiff was injured in his business or property because of Defendants' restrictive or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Defendants and against Plaintiff on Plaintiff's monopolization claim.

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ATTORNEYS FOR PLAINTIFF-APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. HEALOW,	)	No. 95-35241
Plaintiff-Appellant,	)	D.Mont. CV 92-00187-JDS
-vs-	)	
ANESTHESIA PARTNERS, INC.; ANESTHESIA PARTNERS OF MONTANA; and ST. VINCENT HOSPITAL & HEALTH CENTER, INC.,	)	**MOTION TO CERTIFY LEGAL ISSUES, MOTION TO DEFER CONSIDERATION AND MEMORANDUM IN SUPPORT**
Defendants-Appellees.	)	

Comes now Plaintiff-Appellant David G. Healow ("Healow") and respectfully moves the Court as follows:

4. That the Court certify to the Montana Supreme Court, pursuant to Rule 44, M.R.App.P., the following controlling questions of Montana law:

(1) Does a hospital's breach of medical staff bylaws give rise to a claim for contract damages?

(2) Are the fair hearing provisions of medical staff bylaws intended to apply only in cases involving questions about an individual practitioner's conduct?

(3) Is a competitor excluded from the market after declining an opportunity to participate in an unlawful restraint of trade under § 30-14-205, MCA, a person injured thereby within the meaning of § 30-14-222, MCA?

5. That the Court defer consideration of this case until after the final resolution of Yellowstone County District Court Cause No. 93-815, *Hylton v. Anesthesia Partners, Inc., et al.*

DATED this 5th day of October, 1995.

SWEENEY & HEALOW
1250 15th St. West, Ste. 202
Billings, Montana 59102

By: /s/
JAMES P. HEALOW
ATTORNEYS FOR PLAINTIFF-APPELLANT

MEMORANDUM

Healow respectfully submits the foregoing motions are well taken.

I. Motion To Certify.

The issues upon which Healow has requested certification are Montana state law issues which never have been addressed by the Montana Supreme Court. The Montana Supreme Court has adopted a procedure found at Rule 44, M.R.App.P. (copy attached) which allows federal courts to refer state law issues for its consideration. This certification rule eliminates the need for federal courts to predict how the Montana Supreme Court will rule if confronted with a previously unaddressed issue of Montana state law. This Court has in the past availed itself of the Montana Supreme Court certification rule. *See, e.g., Bennett v. State Farm Ins. Co.*, 261 Mont. 386, 862 P.2d 1146 (1993). The three questions which Healow has proposed for certification never have been addressed by the Montana Supreme Court; and each of the proposed issues is dispositive of an issue before this Court.

The Montana Supreme Court may very well be called upon soon to resolve the issues upon which Healow has requested certification, if the *Hylton* case is appealed. By certifying the requested issues, this Court will eliminate any possibility that its prediction of the Montana Supreme Court ruling might conflict with the actual Montana Supreme Court ruling. By certifying the requested issues, this Court therefore will prevent any potential prejudice to whichever party would have benefited from the Montana Supreme Court's actual resolution of the dispositive issues.

II. Motion To Defer Consideration.

The *Hylton* case is the companion to this case. On all state law liability issues, the facts regarding both cases are identical. *Hylton* is scheduled for trial in fewer than eight weeks now. The final pretrial conference in *Hylton* is scheduled for October 19, two weeks from the date of this motion. No party in *Hylton* has to date requested the Court to grant summary judgment.

Healow considers it imperative that all issues of Montana state law be applied uniformly in this case and in *Hylton*. The Court can assure such uniformity by deferring its consideration of this appeal until after the *Hylton* case has been resolved. If the Court certifies this case to the Montana Supreme Court, the *Healow* and *Hylton* matters can be consolidated before that tribunal–guaranteeing that Montana law will be applied identically in the two companion cases.

CONCLUSION

Fundamental principles of fairness and uniform application of the law demand that the Courts harmonize their resolution of all issues of Montana state law in this case and in *Hylton v. Anesthesia Partners, et al.* Accordingly, the Court should grant the foregoing motions.

RESPECTFULLY SUBMITTED this 5th day of October, 1995.

SWEENEY & HEALOW
1250 15th St. West, Ste. 202
Billings, Montana 59102

By: /s/
JAMES P. HEALOW
ATTORNEYS FOR PLAINTIFF-APPELLANT

FILED December 8, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. HEALOW,	)	No. 95-35241
	)	
Plaintiff-Appellant,	)	DC# CV-92-187-JDS
	)	Montana
vs.	)	
	)	
ANESTHESIA PARTNERS, INC., et al.,	)	ORDER
	)	
	)	
Defendants-Appellees.	)	
	)	

Before: SNEED and TROTT, Circuit Judges

Appellant's "Motion to Certify Legal Issues" to the Montana State Supreme Court is denied.

Appellant's motion to stay this appeal pending resolution of a related state court case is also denied.

This case is ready for calendaring.

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